

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-7626

UNITED STATES COURT OF APPEALS

**ORIGINAL
WITH PROOF
OF SERVICE**

for the
SECOND CIRCUIT

B

P/S

ANNA R. JOHNSON and ROBERT K. JOHNSON,

Plaintiffs-Appellants,

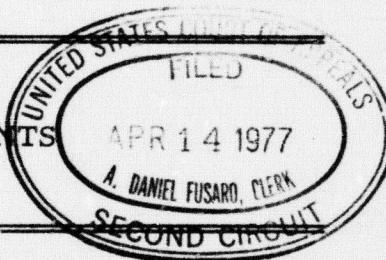
-against-

PHILLIP KNAPP,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANNA R. JOHNSON and ROBERT K. JOHNSON,
Plaintiffs-Appellants,
against
PHILLIP KNAPP,
Defendant-Appellee,

Appeal from the United States District Court for the
Southern District of New York.

BRIEF FOR PLAINTIFFS-APPELLANTS.

Preliminary statement.

On May 4, 1976, the above captioned medical malpractice action, which was tried before the Court and jury, was concluded by the jury's return of a verdict for the defendant. An appeal was filed and docketed and the scheduling order called for the argument of this appeal on December 10, 1976. The trial was held before Hon. William C. Conner. On December 10, 1976, this Court affirmed the judgment.

On October 13, 1976, plaintiffs moved the trial Court to overturn tainted verdict and for a new trial under Rule 59, based on a letter, prejudicial to the plaintiffs, sent by a lady juror, to the defendant's counsel concerning the verdict, which only recently, by accident, had come to the attention of plaintiffs' counsel. (A-4,5,6,7,8,9).

The trial Court regarded the plaintiffs' application as a motion to set aside the judgment pursuant to Rule 60(b) F.R.Civ.P. and found under the strictures of Rule 60, the plaintiffs' motion was clearly timely, although finding that the time within which plaintiffs might have duly moved under Rule 59 had run prior to the filing of the motion. On November 24, 1976, the trial Court, Hon. William C. Conner, denied this motion and the plaintiffs appeal from this judgment. (A-23, 24, 25, 26, 27, 28, 29, 30).

QUESTIONS INVOLVED IN THIS APPEAL
and
THE ISSUES PRESENTED FOR REVIEW

Is it the duty of the Court to set aside a tainted verdict and grant a new trial because of the misconduct of a juror, which was prejudicial to the plaintiffs, denying them a fair trial?

Whether the motivation of the juror was so unlawful or improper as to require the Court to nullify her vote and therefore the entire verdict?

STATEMENT OF THE CASE

This was a civil diversity action for money damages by a lady against an ophthalmologist for becoming permanently blind after surgery performed by the doctor on both her eyes for the removal of bilateral cataracts. On May 4, 1976, the jury returned a verdict for the defendant doctor.

The plaintiffs filed an appeal to this Court and during the pendency of this appeal, it came to the attention of the appellate counsel for the plaintiffs that juror No. 5, Laura Lee Lewis, had written a letter to the counsel for the defendant, expressing prejudice, against the plaintiffs in favor of the defendant. (A-14,15). She also enclosed a copy of an article from a newspaper that she had read and retained concerning cataracts ten days before she was chosen to sit on the plaintiffs' jury. (A-16)

On July 20, 1976, appellate counsel for the plaintiffs wrote to defendant's counsel and asked for a copy of said letter and article and received no reply. (A-9). On August 9, 1976, having received no reply from defendant's counsel, appellate counsel for the plaintiffs filed a motion in this Court to have the letter produced for inspection or copying. (A-10,11,12).

As a result of said motion a copy of the letter from the juror and the copy of the newspaper article was sent to counsel for the appellants on August 12, 1976. (A-13,14,15,16).

On the 13th day of October, plaintiffs filed their motion to overturn tainted verdict and for a new trial under Rule 59. (A-4,5,6,7,8,9). On the 20th day of October, 1976, the defendant filed an opposing affidavit. (A-17,18,19).

On the 19th day of October, trial counsel for the defendant, a Mr. Walter Begos, filed an affidavit, including the voir dire of juror No. 5, Laura Lee Lewis, which indicated she was not married and was employed as a secretary. No mention was made of any hearing impairment nor of any information or preconceived ideas she had about cataract surgery due to the article she had read ten days before in the paper and had cut out and saved and then sent to attorney for the defendant after the verdict for the defendant, together with her prejudicial letter. (A-20, 21, 22).

On November 24, 1976, without holding any hearing to question the juror or the attorney for the defendant, the Court, Hon. William C. Conner, rendered judgment and denied plaintiffs' motion for a new trial and to overturn the tainted verdict. (A-23, 24, 25, 26, 27, 28).

On December 14, 1976, plaintiffs filed their appeal from said ruling. (A-30).

STATEMENT OF FACTS RELEVANT TO THE ISSUES
PRESENTED FOR REVIEW

On May 4, 1976, a jury verdict was returned in this matter in favor of the defendant, doctor, and on May 20, 1976, Notice of Appeal was filed in this Court. On July 20, 1976, trial counsel for the plaintiffs informed appellate counsel herein for the plaintiffs that he had a conversation about a week before July 20, 1976, with trial counsel for the defendant, a Mr. Walter Begos, in which Mr. Begos revealed to him that he had received a letter from a lady juror after the verdict and that it was not favorable to the plaintiffs. (A-6).

On July 20, 1976, counsel for the plaintiffs sent a letter to Mr. Walter Begos asking for a copy of said letter, but did not receive any response thereto as of August 9, 1976. (A-9). On said August 9, 1976, because of no response to her letter, counsel for the appellants, the plaintiffs, made a motion to this Court to have the letter produced for inspection and copying. (A-11,12). On August 12, 1976, a copy of the juror's letter and copy of a newspaper article sent to the defendant's counsel, Mr. Begos, was sent to counsel for the plaintiffs and the motion to produce was withdrawn. (A-13,14,15,16).

On October 13, 1976, a motion for a new trial and to overturn the tainted verdict for the defendant was filed on behalf of the plaintiffs. (A-4,5,6,7,8,9,10,11,12). On November 24, 1976, the trial Court denied the motion and an appeal was filed from said order on December 14, 1976 by the plaintiffs. (A-23,24,25,26,27,28,29,30).

The juror wrote the letter to the defense counsel after the verdict, therefore it was impossible for the plaintiffs' counsel to have known anything about this matter until a copy of this letter and the accompanying newspaper article about cataract operations was received by the plaintiffs' counsel in the middle of August, 1976, more than three months after the verdict for the defendant on May 4, 1976. (A-13,14,15,16).

It is fair to assume that the knowledge of this letter from the juror to the defendant's counsel would never have come to light if plaintiff's counsel had not compelled the defendant's counsel to send her a copy of the same. The date of the letter is June 2, 1976, and Mr. Walter Begos, attorney for the defendant did not reveal this letter to the court as he should have, and plaintiffs' counsel did not receive a copy of the letter until August 12, 1976. (A-13).

The letter was only about the case, Johnson vs. Knapp, and in this letter, the juror stated that she had a hearing impairment and that she was "titillated" by the defense counsel's presentation, and she was in substance wondering if during the trial, especially in his summation, whether he was "titillated" by her during the trial. (A-14).

The newspaper article she sent to him along with the letter, entitled "Eye to Eye With Dr. Charley" was an amusing piece about an eye surgeon who teaches his surgery method to other doctors for one week, then invites them to a commencement at the Gas Light Club, where he plays the sax clarinet and piano and sings about 15 songs and tells jokes. He sings his commencement address to the tune of "My Way", as follows:

"Practice hard on eye banks eyes/
Because if you don't you just might fail/
And don't call me if you're in jail/
I couldn't lie/ I'd testify/
It WASN'T MY way."

This Doctor Charley was then honored in this article by an eloquent testimonial as follows:

"You haven't lived until you've had Charley hovering over you removing your cataract while singing 'I Only Have Eyes for You.'" (A-14,15,16).

After the plaintiffs' motion was filed the Court did not hold any hearing to ascertain from juror No. 5, Laura Lee Lewis, or from Attorney Walter Begos, any information concerning this letter or newspaper article or her hearing impairment or her motivation in rendering her verdict or in sending the letter, the Court just denied the plaintiffs' motion for a new trial.

A R G U M E N T

POINT ONE

IT WAS THE DUTY OF THE COURT TO SET ASIDE THIS TAINTED VERDICT AND GRANT A NEW TRIAL BECAUSE OF THE MISCONDUCT OF JUROR NO.5.

The plaintiffs' evidence is undisputed, the facts conclusively show prejudice in this verdict against the plaintiffs, there was private contact by mail and communication directly by a juror with counsel for the defense, which communication by mail was about the conduct of the trial and the outcome of the trial, which was prejudicial to the plaintiffs. It was gross misbehavior for the juror to write this letter to the defense counsel concerning the cause which she was trying. The courts look with suspicion upon any communications between parties to the suit or their counsel and the jury impanelled to try it. In this case the letter of the juror clearly shows that her mind was influenced by her romantic thoughts revolving around the defense counsel, and she did not render her verdict on the evidence, since her fantasies

were prejudicial to the plaintiff and the plaintiffs failed to receive a fair trial of their peers that they were entitled to. The verdict reached by this juror and therefore the entire jury was not by conscientious observance of the oath which every juror took, including juror No. 5, Laura Lee Lewis, and therefore it was the duty of the Court to grant a new trial. (United States v. Brandenburg, 3 Cir. 162 F 2d 980, 983) There is no question that the conduct of juror No. 5 was prejudicial to the plaintiffs. (A-14, 15, 16). If any possible prejudice could have arisen because of this prejudicial conduct of the juror and the counsel for the defendant for failing to report this to the Court as an officer of the Court, a new trial should be granted to the plaintiffs. The action of the juror should have been examined by the Court. The communication between the juror and the defense counsel involved the case and it was the duty of the Court to hold a hearing to determine that nothing was done to influence the mind of the juror and that the juror was not influenced in her verdict either by her infatuation with defense counsel, her impaired hearing, and/or the newspaper article about Dr. Charley, which she read and kept as early as ten days before she was chosen as a juror in this case. (California Fruit Exchange v. Henry 89 Fed Supp, 580; Alexander v. Commonwealth, 105 Pa; Commonwealth v. Manfredi, 162 Pa 144; Wiest v. Layendyk, 73 Mich. 661, 665; Zageir v. Southern Express Co., 171 N.C. 692; Tillett v. Norfolk Southern R.R. Co. 166 N.C. 515, 520).

Under Rule 60(b) of the Federal Rules of Civil Procedure, the trial Court should have found that because of the tainted verdict the judgment rendered on May 4, 1976 was void and it is no longer equitable that the judgment should have prospective application, since justice in this case does require a new trial. The evidence presented on the motion by the plaintiffs, which consisted of the juror's letter and the newspaper article was not in existence at the time of the trial and the motivation of the juror was hidden at the time of judgment.(A-14,15,16).

The function of a Court at a hearing for a new trial is to determine whether the evidence presented at the hearing considered with the evidence presented at the original trial warrants the granting of a new trial. This determination is within the sound discretion of the Court.(Pass v. Pass, 152 Conn. 508,512) The trial Court in the case at bar decided the plaintiffs' motion on the papers filed and did not conduct any hearing or receive any evidence.(A-4,5,6,814,15,56).

In the case at bar, there is no question that the letter sent to the defense counsel conclusively showed prejudice, which resulted in an unjust verdict and a tainted verdict, and the trial Court should have set aside the verdict and granted a new trial. In the alternative, the trial Court should have followed the proper procedure and conducted a hearing, formal or informal in the presence of a Court reporter, at which the facts could have been established.(Remmer v. United States 347 U.S. 227;United States v. Miller, 381 F.2d 529,538(2d Cir.);United States V. Gersh,328 F. 2d 460,462 (2d Cir.);Mugnola v. United States,37 U.S.,992).This

is a case where it was established that there was a private contact and a written communication, about this case alone, by a juror with the defense counsel, which was prejudicial to the plaintiffs. Here the trial Court should have fully developed the facts by interrogating the juror in question, and as a result of this interrogation, the Court then should have ruled on the plaintiffs' motion for a new trial and to overturn this tainted verdict. (Remmer v. U.S., *supra*; United States v. Miller, *supra*, 538; United States v. Gersh, *supra*). In the case at bar, the trial Court, Hon. William C. Conner, abused his discretion in determining that justice did not require a new trial in this case.

The order of Judge Conner in denying a new trial for the plaintiffs because of the misconduct of the juror No. 5, Laura Lee Lewis, though discretionary, is indeed appealable and the question of a new trial is one of substance. (Mattox v. United States, 146 U.S., 140; Jorgensen v. York Ice Machine Corp. 160 F.2d, 432 (2 Cir.).

In *Jorgensen v. York Ice Machine Corporation, supra*, on page 435, this Court said:

"All this has nothing to do with what evidence shall be competent to prove the facts when the facts do require the verdict to be set aside, as concededly some facts do. The two decisions of the Supreme Court which we have cited, as well as its approach in *United States v. Reid*, and *Hyde v. United States*, suggest it is not improbable that when the question arises in the future, the testimony of the jurors may be held competent, and that we shall no longer hear that they may not "impeach their verdict," when it is "impeachable" if what they say is true."

As far back as 1892, the Supreme Court held in *Mattox v. United States*, 146 U.S. 140, 149:

"Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated."

On a motion for a new trial on the ground of bias on the part of one of the jurors, a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated on his mind; and he may also testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial. (*Mattox v. United States*, *supra*).

Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge are absolutely forbidden, and invalidate the verdict at least unless their harmlessness is made to appear. (*Mattox v. United States*, *supra*). In *People v. Leonti*, 262 N.Y. 256 (1933), where a statement of bias was made by a juror after the verdict, the juror was summoned for inquiry. This should have been done in this case at bar. In *Rose v. New York Life Ins. Co.*, 127 Ohio 265, (1933), it was held that conduct or misconduct outside the jury room or apart from the jury deliberations is not protected by the rule that a juror cannot impeach his own verdict.

The Court should have received evidence of the happening of the events in regards to the misconduct of juror No. 5, since it would have supplied the evidence which can be put to the test of other testimony (and thus sound policy is satisfied) and at the

same time the evidence could have served to avert a grave miscarriage of justice, which it is certainly the first duty of a Court of conscience to prevent if at all possible.(Aillon v. State of Conn., Conn. Law Journal, Vol. XXXVI No. 49, June 3, 1975, Page 10; State v. Kociolek, 20 N.J. 92,100; Perry V. Bailey, 12 Kan. 539,544).

POINT TWO

THE MOTIVATION OF THE JUROR WAS SO UNLAWFUL OR IMPROPER AS TO REQUIRE THE COURT TO NULLIFY HER VOTE AND THEREFORE THE ENTIRE VERDICT.

Where Court, in the course of voir dire examination asked members of the jury panel whether any of them knew why they could not sit and render a fair verdict in this case, the juror No. 5 failed to reveal to the Court and to the plaintiffs that she only had partial hearing, one of the factors which led to her infatuation with defense counsel because of his "resonance voice" as she called it in her letter to him. She also expressed how his voice "titillated" her and how much she enjoyed the court trial because of him. In all probability, she did not hear the evidence presented by plaintiffs' counsel, who was not endowed as was the defense counsel.(A-14,15). This juror also failed to reveal to the Court and the plaintiffs' counsel on voir dire that she had read an article, exactly in point, concerning the eye operation for cataracts, which she had saved and later mailed to the defense counsel, which then posed these eye operations as a comedy and nothing of any seriousness, when in the plaintiffs' case, she lost complete eyesight in both eyes because of just such an eye operation for cataracts, and although the juror had a preconceived notion about cataract operations, she said nothing.

By this juror remaining silent as to these points and then serving on the jury the possibility that this juror was subject in some degree to extraneous influence of her deafness, and the giving of such importance to the article she had just read in the paper about cataract operations, rendered her incompetent, and the effect of her silence was to deceive and mislead the Court and the plaintiffs' counsel and the plaintiffs in respect to her competency and had the effect of nullifying the right of peremptory challenge, and plaintiffs, upon discovery of this incompetency, are entitled to relief from judgment entered against them. (Consolidated Gas & Equipment Co. of America v. Carver, C.A. Cola, 1958, 257 F. 2d 111). (A-20, 21).

The facts also show that this lady juror, by the writing of the letter to defense counsel, which concerned only this case, and then signed it "FONDLY" was under an emotional influence amounting to being drunk with admiration for the defense counsel, all through the trial, and her admiration went beyond that of ordinary admiration. The word "titillate" amounts to being sexually aroused. This Court in Jorgensen v. York Ice Machine Corporation, supra, 435, held that drunkenness, bribery, receiving incompetent documents, or privately interviewing a party, require that a verdict be set aside, when a juror or jurors are guilty of such things.

There is no question that juror No. 5, Laura Lee Lewis, was guilty of being drunk with emotion in favor of the defendant and courting the affections of the defense counsel by her expressions contained in her letter to the defense counsel, thereby making her incompetent to serve on this jury and this verdict should be set aside.

This juror's deep seated prejudice against the plaintiffs, which is evidenced by her reference to her being annoyed that the "jury deliberations took all day," and that she "was pleased at the outcome," which was a complete victory for the defense, and a complete injustice to the plaintiffs, certainly not only placed her impartiality in question, but shows where her feelings lied, and this alone should require the setting aside of the verdict for the defendant. (King Size Publications, Inc. v. American News Co., D.C.N.J. 1961, 194 F.Supp.100).

Lastly, even though final judgment had been entered and appeal from such judgment had been perfected by the filing of notice of appeal, the district Court retained jurisdiction to consider motions for new trial upon ground of newly discovered evidence. (Butts v. Curtis Pub. Co., D.C.Ga.1964, 242 F.Supp.390.)

IN CONCLUSION

It is respectfully submitted that the judgment for the defendant be set aside and this Court remand for a new trial.

Respectfully submitted,

HELEN F. KRAUSE,

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Trumbull, Connecticut, 06611

Attorney for
Plaintiffs-Appellants

STATE OF NEW YORK) ss .
COUNTY OF NEW YORK)

Kenneth E. Kennedy, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1171 Sterling Pl
BKlyn NY 11213.

That on the 14th day of APRIL, 1977,
deponent personally served the within BRIEF FOR PLAINTIFFS-
APPELLANTS

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

ANTHONY L. SCHIAVETTI
Attorney for Defendant-Appellee
c/o ARTHUR N. SEIFF
51 Chambers St.
New York, N. Y. 10007

Kenneth C. Kennedy

Sworn to before me this

14th day of APRIL, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930508
Qualified in Queens County
Commission Expires March 30, 1979